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42 U.S.C. (Civil Rights Act):

Sec. 1983 2-6

IN THE

Supreme Court of the United States

OCTOBER TERM—1974

No. 74-185

ROBERT B. GREEN, Individually and as Administrator of the Estate of JAMES MICHAEL GREEN, Deceased,

Petitioner,

vs.

MARTIN H. WEINBERG, M.D.; MICHAEL ROTOFF, M.D.; IVAN F. BIRD, M.D. and J. G. ELIZONDO, M.D., jointly, severally and in the alternative,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

Counter-Statement of Question Presented

1. Is a complaint on behalf of a deceased mental patient seeking money damages and alleging improper medical

care but not asserting "bad faith" on the part of the defendant officials cognizable under the Civil Rights Act, 42 U.S.C. §1983?

Counter-Statement of Facts

This is a petition by Robert B. Green (hereinafter "petitioner"), individually and as administrator of the estate of James Michael Green, deceased (hereinafter "decedent"), for a writ of certiorari to review the judgment of the Court of Appeals for the Third Circuit, entered on May 30, 1974, affirming a final judgment of the District Court for the District of New Jersey, dated July 6, 1973, which dismissed petitioner's complaint for failure to state a claim upon which relief can be granted.

Decedent was voluntarily admitted to the State Hospital at Ancora on September 5, 1968, and subsequently committed by order of the court pursuant to the procedures set forth in N.J.S.A. 30:4-37 dealing with voluntary commitments. Decedent's history included four previous admissions to the State Hospital over the period from December 1965 through June 1968.

On June 20, 1969, due to his violent and unmanageable behavior and at the request of the Medical Director of the State Hospital at Ancora, decedent was administratively transferred to the maximum security Forensic Psychiatric Section (hereinafter "Vroom Building") of the Trenton Psychiatric Hospital pursuant to the provisions of N.J. S.A. 30:4-83 and N.J.S.A. 30:4-84.3. Decedent expired on October 20, 1970, while a patient at the Vroom Building.

The complaint was subsequently filed under the Civil Rights Act, 42 U.S.C. §1983. It alleged that decedent

was provided with little or no "proper" medical care or attention, and received improper treatment endangering his "safety"; that as a result of "the failure of defendants to properly treat, maintain, care for, and guard against injury to" decedent, he was caused to die; and demanded compensatory and punitive damages for a sum in excess of $10,000. The second cause of action alleged that as a direct result of defendants' actions, petitioner was required to incur large medical and hospital expenses for which demand in excess of $10,000 was made.

The District Court for the District of New Jersey subsequently found that the above allegations sounded in negligence and as such were not cognizable under the Civil Rights Act and dismissed the complaint. The Court of Appeals for the Third Circuit affirmed the dismissal on the ground that no claim was stated under the federal Civil Rights Act.

On August 26, 1974, the petition for a writ of certiorari was docketed in this court.

ARGUMENT

The decisions of the Courts below were clearly correct in finding that petitioner's complaint fails to state a claim cognizable under the Civil Rights Act because it is based upon allegations of malpractice and/or negligence and does not allege "bad faith" on the part of defendant officials.

It is well established that a simple common law tort does not fall within the purview of the Civil Rights Act, 42 U.S.C. §1983, but rather a fundamental threshold requirement to establish a cause of action is the assertion

of "bad faith" on the part of the defendant officials. *Pierson* v. *Ray*, 386 U. S. 547 (1967). Since the recognition of broad official immunity would effectively frustrate any §1983 action, the courts have adopted a test of "good faith qualified governmental immunity". Consequently, immunity is a valid defense when (1) the official's acts were discretionary, and (2) the official was acting in good faith.

Since *Pierson*, the courts have recognized the defense of good faith for public officials sued under the Civil Rights Act in a wide variety of contexts. See, e.g., *Franklin* v. *Meredith*, 386 F. 2d 958 (10th Cir. 1967) (psychiatrist and superintendent of state hospital); *Urbano* v. *McCorkle*, 334 F. Supp. 161 (D. N. J. 1971) and 346 F. Supp. 51 (D. N. J. 1972), *aff'd* 481 F. 2d 1400 (3rd Cir. 1973) (prisons).

Most importantly, *Donaldson* v. *O'Connor*, 493 F. 2d 507 (5th Cir. 1974), which petitioner cites as establishing a conflict between the circuits such as to warrant the grant of certiorari dealt extensively with the issue of the "good faith" defense to §1983 actions. Indeed, the circuit court there sanctioned the instructions of the trial court to find for the defendants if the jury determined that those defendants had acted in good faith. *Id.* at 530. Only after a finding to the contrary were the courts able to reach the issue of whether a §1983 action lay under a claim of a constitutional right to treatment. However, the case before this court lacked the appropriate allegations of "bad faith" and the determination was not ultimately reached upon a consideration of the constitutional right to treatment.

The court in *Smith* v. *Spina*, 447 F. 2d 1140, 1143 (3rd Cir. 1973) was careful to point out this additional dimension of a Civil Right Act suit:

> "It is, of course, fundamental that the Civil Rights Act permits recovery for only 'deprivations of any rights, privileges, or immunities secured by the [federal] Constitution and [federal] laws'. We have recently said: 'It becomes important to delineate that conduct which is actionable in state courts as a tort, and that which is actionable in federal courts under §1983. The two rights of action do not always stand in pari materia. Some common law and statutory torts, although actionable in a state forum, do not rise to constitutional dimensions. The converse is equally true. Conduct may be actionable as a deprivation of constitutional rights where no force and violence has been utilized and there exists no orthodox counterpart of state common law or statutory relief available'."

• • •

The essence of petitioner's complaint was predicated upon the theory that decedent died as a result of receiving "improper" medical treatment while a patient in the Forensic Psychiatry Section at the Trenton State Hospital. As such, the complaint sounds in tort and is not cognizable under the Civil Rights Act, 42 U.S.C. §1983. *Isenberg* v. *Prasse,* 433 F. 2d 449 (3rd Cir. 1970); *Smith* v. *Clapp,* 436 F. 2d 590 (3rd Cir. 1970); *Gittlemacher* v. *Prasse,* 428 F. 2d 1 (3rd Cir. 1970).

Paragraph 12 of the First Count of the complaint vaguely alleges that the decedent received "little or no proper medical care or attention, was improperly cared for . . ." Paragraph 13 states that decedent's death resulted from "the failure of the defendants to properly treat, maintain, care for, and guard against injury to the person of . . . James Michael Green . . ." Such assertions

of negligence must be clearly distinguished from the deprivation of a constitutionally protected right.

The conclusionary assertions of the deprivation of constitutional rights are nowhere supported by factual allegations in the complaint. The District Court and Court of Appeals were not presented with pleadings upon which a case for any constitutional right to treatment for mental patients could be founded. At best, petitioner has presented a cause of action grounded in a difference of opinion as to diagnosis and treatment which, standing alone, fails to lift the suit to a level of constitutional proportions.

Clearly, therefore, suits for money damages filed pursuant to 42 U.S.C. §1983 require an assertion of "bad faith" on the part of defendant officials in addition to an allegation of deprivation of a constitutional right. The instant case reflects a total absence of any such "bad faith". In that absence, even if a court were to find a right to treatment for mental patients of constitutional dimensions, there would still not exist a cause of action for money damages under §1983. Consequently, it is submitted that the petition under consideration does not present an appropriate occasion for this Court to grant certiorari.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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